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SENSITIVE

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TREASURY FOR OASIA

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SUBJECT: VIETNAM: ONE STEP FORWARD, TWO STEPS BACK - TYCO  
SERVICES LOSES APPEAL ON ARBITRAL AWARD ENFORCEMENT

SENSITIVE BUT UNCLASSIFIED - HANDLE ACCORDINGLY

1. (SBU) Summary: On January 21, 2003, the Vietnamese Supreme Court reversed a May 2002 landmark decision by the Ho Chi Minh City Economic Court that would have recognized an international arbitral award for the first time in that city. The Mission has been assisting Tyco Services Singapore since 2001 in its attempts to get two awards enforced in Vietnam. Mission has also worked with the Ministry of Justice, which had reviewed the case and issued an advisory opinion to the Courts in support of Tyco's position. The case was perhaps deceptively simple - the court was asked to enforce a legitimate international arbitration award, not reopen or reargue the original dispute. However, at the real heart of this case is the current lack of understanding at the highest judicial levels of modern, market-based normal business transactions as well as a continuing lack of transparency.

2. (SBU) Summary cont'd: The Supreme Court's reversal is particularly disheartening in light of the earlier decision by the HCMC Economic Court, which helped Vietnam garner much positive international press and good will last summer. In fact, the presiding judge from the Economic Court presented a case-study at a USG-sponsored seminar that brought together all Supreme Court judges from around the country to discuss their important role in Vietnamese legal reform and implementation of the BTA. Clearly, this decision, whether overturned on review or not, will have a negative impact on Vietnam's international reputation and its ability to attract foreign investment. It casts further doubt on the transparency and fairness of the legal process and raises additional questions about Vietnam's ability to live up to its obligations under the U.S.-Vietnam Bilateral Trade agreement and the New York Convention. Mission recommends that this issue be raised in the context of the BTA Joint Committee meeting, not to argue the merits of the case but to stress our expectation that U.S. businesses will be treated fairly by the Judicial system and that international commitments will be respected. End Summary.

#### BACKGROUND ON THE CASE AND THE LEGAL ENVIRONMENT

3. (SBU) The Mission has been working with Tyco Services Singapore Pte Ltd., a subsidiary of U.S. firm Tyco International regarding Tyco's attempts to get two Australian arbitral awards enforced in Vietnam. We had also consulted the Ministry of Justice (MOJ) to express our interest and concerns regarding the case, the absolute need for transparency of the hearing and the decision making process, and the need for a full and fair hearing for the U.S. company, especially in light of Vietnam's commitments in the U.S.-Vietnam Bilateral Trade agreement (BTA). The Ministry of Justice had reviewed the case and had issued an advisory opinion to the HCMC Court in support of Tyco's position. The case was perhaps deceptively simple - the courts were asked to enforce a legitimate international arbitration award, not reopen, review, or reargue the original case.

4. (SBU) However, at the real heart of this case is the current lack of understanding of modern, market-based normal business transactions by a generally unprepared and untrained legal and judicial system. The Vietnamese judiciary consists of the Supreme People's Court, the local people's courts, military tribunals, and other tribunals established by law. The Supreme Court, which has three regional seats - Hanoi, Ho Chi Minh City, and Danang - is the highest court of appeal and review. The Ministry of Justice administers most district and provincial courts, and the National Assembly administers the Supreme Court. The judiciary also has Economic Courts and other specialized courts that resolve disputes in specific fields. The Economic Courts have addressed few cases since their creation in 1995. Cases are rarely appealed to the Supreme Court, where the judges have little experience and training in economics, trade and finance. In fact, most judges and lawyers received their legal training in Socialist legal systems and are ill-equipped to deal with market-based concepts. In particular, the distinction between trade in

goods and trade in services is not well understood in Vietnam. The MOJ attempted to clarify for the courts both this difference as well as Vietnam's obligations under the UN Convention of the Recognition and Enforcement of Foreign Arbitral awards (the New York Convention). (Vietnam is not yet a party to ICSID, but we are actively working with the GVN towards this goal in which the GVN has expressed interest.)

15. (SBU) In 1995, Tyco had provided construction services for the Furama Resort Hotel in Danang for Hai Van Thiess (HVT), now know as Leighton Contractors Ltd, an Australian-Vietnamese joint venture construction company. Tyco never received full payment and went to arbitration in Queensland, Australia as specified in their agreement with HVT. In 2000, Tyco won that case, as well as a subsequent appeal by HVT in Australia. When HVT refused to pay the arbitral award (\$2.2 million), Tyco filed an application in 2001 with the Vietnamese Ministry of Justice to have the award enforced in Vietnam under the Ordinance on Recognition and Enforcement of Foreign Arbitration Awards. MOJ sent the case to Danang. However, in July 2001, the Danang Court determined that it did not have the authority to hear the case because the company, HVT, had moved its headquarters to HCMC, reorganized its ownership and renamed the firm Leighton Contractors. In August 2001, MOJ sent the case to the Economic Court of the HCMC People's Court.

#### THE FIRST CASE - THE GOOD..

16. (SBU) Tyco finally had its day in court in May 2002. In its petition to the court to reject Tyco's claim, HVT/Leighton attempted to reopen the validity of the original arbitral award. They argued that the application for enforcement be denied based on the allegation that the original Consortium agreement was invalid because it had not been certified by the Ministry of Planning and Investment (MPI), Tyco did not have license for foreign contractors from the Ministry of Construction, the consortium agreement was not a "commercial" agreement and so was not governed by the Ordinance on Economic Contracts or the Ordinance Foreign Arbitration, the Queensland arbitrator had violated procedures in settling the claims, and finally, the arbiters were biased and unfair.

17. (U) In its clear, well-written, and focused May decision, the HCMC Economic Court looked at each of these issues in a fair and legalistic manner. The Judges Panel confirmed that under the Arbitration ordinance, they were not allowed to re-arbitrate the dispute and thus dismissed the argument that the agreement was invalid. However, the Court went further in its decision and explored the argument on its merits. HVT/Leighton argued that the agreement was invalid because the Ministry of Planning and Investment (MPI) had not certified it and Tyco did not have the legal capacity to sign because it did not have a license for foreign contractors issued by the Ministry of Construction. This argument hinges on an interpretation of the Ordinance on Economic Contracts, which only covers agreements signed between Vietnamese entities and foreign organizations in Vietnam. As the agreement was for construction services, it was not necessary for Tyco to have a presence in Vietnam. The Panel found that the agreement was not governed by the Ordinance since Tyco did not have offices in Vietnam. Therefore, the agreement could not be found invalid under that law. Going further, they found that even if the Ordinance did apply, the agreement clearly stated that the agreement would be interpreted and governed by Queensland law in the case of disputes. Finally, even if Vietnamese civil law did apply, HVT would have had to take Tyco to court within one year of its signing in order to have the agreement invalidated. Thus, the court ruled that Leighton, on its own, cannot declare the agreement to be invalid in order to avoid enforcement in Vietnam.

18. (U) The second argument that the agreement was not a "commercial relationship" and thus the arbitral award could not be recognized or enforced in Vietnam.(previous sentence is missing a verb or something) This point is more technical. However, in sum, HVT referred to a definition in the 1998 Commercial law that the Panel ruled it did not apply in this case, because it was not in effect at the time the agreement was signed.

19. (U) The third argument that the Queensland arbitrator had violated procedures in settling the claims was based on a claim by HVT/Leighton that a decision by the arbiters had added a clause to the agreement related to bank guarantees. However, the Panel determined that this argument relates to the substance of the dispute, and the Panel did not have the authority to re-arbitrate the dispute.

110. (U) Regarding the fourth argument that the arbitral decision was biased and unfair toward HVT/Leighton, the Panel examined the arguments and found that the charge was groundless and that the awards were issued in accordance

with Australian law, per the agreement. Thus, HVT/Leighton was instructed to pay the award. HVT/Leighton promptly filed an appeal to the Supreme Court.

#### THE SECOND CASE - THE BAD?

11. (SBU) The appeal of the Economic Court's decision was originally scheduled to be heard before the Supreme Court in HCMC on August 27, 2002. However, HVT/Leighton succeeded in obtaining delays by changing lawyers several times, dragging it out by almost 6 months. The Embassy weighed in with the Ministry of Justice to express our concern over the delays and the fact that the Court had actually exceeded its normal statutory time to hear the case. When the case was finally heard on January 21, 2003, the Supreme Court overturned the earlier decision by the Economic Court, finding that the arbitral award was not enforceable in Vietnam.

12. (SBU) Although we do not yet have the written decision, EconOff HCMC attended the January 21 appeal hearing and provided a preliminary readout of the proceeding. The presiding judge stated in the initial oral decision that - contrary to the lower court's decision - the court did not have the authority to enforce the arbitral award due to two factors. First, Tyco failed to apply for a license from the GVN for its activities in Vietnam during the relevant period. Therefore, it was operating outside the body of commercial law that could be used to enforce the award (N.B. We assume he means that Tyco, as a sub-contractor for services, was not covered under HVT/Leighton's construction license). In particular, under Vietnamese law, Tyco's scope of work fell under "construction" rather than "commercial" (i.e. service) activity, requiring a separate foreign contractor's license. Thus the Panel apparently ruled in favor of HVT/Leighton's original argument (see above) and found the agreement invalid, and thus unenforceable, under Vietnamese law. In essence, they ignored the arbitral award and re-arbitrated part of the original case. They also apparently largely ignored the MOJ's advisory opinion.

#### AND THE UGLY.

13. (SBU) Tyco's local attorneys told Econoff HCMC that they were offered an opportunity to "become a friend of the court." (N.B. We assume that's codeword for a payoff.) They declined the offer (but would not supply specifics as to who approached them) and lost the case. The local attorneys believe - not provable, they note - that Leighton took up a similar offer. The lawyers stressed that only strong political pressure can counterweigh any payoff that they believe was made. (Embassy Note: In December when we were discussing our approach to the GVN on this issue, the local lawyers pushed hard for the Embassy to write to the Prime Minister, i.e. a political approach. It was and is our position that in light of our attempts to reform the judicial system in Vietnam, such an approach that bypassed - and urged the GVN to bypass - normal legal channels was inappropriate. We addressed this as a legal issue with the Ministry of Justice, which we knew was also in agreement on the legal facts of the case. End note.)

14. (SBU) However, Tyco's Hanoi-based representative was disappointed that their local lawyers had missed several important opportunities to clarify the legal nuances before the Supreme Court. He noted that he "could have done a better job (of lawyering) himself." (HCMC Econoff likewise was unimpressed by the Tyco attorneys' performance in court.) For example, when the Panel raised the issue of whether Tyco required a license, the lawyers did not refute the assumption that a license was necessary (as the Economic Court had). Instead, the lawyer replied that Leighton should have told them if it were necessary. A more responsive answer arguing the law might have allayed some of the court's concerns.

#### SUPREME COURT DECISION MAY BE REVIEWED

15. (U) Although, the Supreme Court is the final Court of Appeal in Vietnam, the MOJ confirms information conveyed to Econ FSN by one local judicial contact: Tyco can still petition the case's review by senior judges in Hanoi. However, review is case by case, and there is no mechanism for automatic review.

16. (SBU) Tyco clearly regards the decision as a major setback. As Tyco reviews its options, it has asked for further Mission assistance in urging the GVN to enforce the arbitral award. We will review with Tyco their analysis of the Supreme Court decision, in light of the earlier Economic Court decision, and explore appropriate options for action.

#### COMMENT

17. (SBU) This decision is particularly disheartening in light of the earlier and much touted decision by the HCMC Economic Court. Vietnam garnered much positive

international press and good will last summer regarding this landmark case, the first international arbitral award to be enforced in Vietnam. (N.B. There are several other cases before the Hanoi Courts but none is final or involves a U.S. company.) For once, Vietnam was praised for a legal decision. In fact, the presiding judge from the HCMC Economic Court was invited by the GVN to present a case-study at a USAID-STAR project seminar that brought together Supreme Court judges from around the country to review legal reform and BTA implementation. When the Ambassador addressed the Supreme Court judges at the opening of the seminar, he stressed their important role in Vietnamese legal reform and implementation of the BTA.

18. (SBU) Clearly, this decision, whether overturned on review or not, will have a negative impact on Vietnam's international reputation and its ability to attract foreign investment. It casts further doubts on the transparency and fairness of the legal process and also raises additional questions on Vietnam's ability to live up to its obligations under the BTA Investment Chapter. International arbitration clauses are a key component of any business contract signed by foreign parties in Vietnam. The Tyco case was the first "successful" attempt by a U.S. firm to have an international arbitral award enforced in Vietnam. The high court's ruling - for whatever reason - will certainly cause many here and abroad to rate Vietnam a bit higher on the commercial risk scale.

19. (SBU) Mission recommends that this issue be raised in the context of the BTA Joint Committee meeting, not to argue the merits of the case but to stress our expectation that U.S. businesses will be treated fairly by the Judicial system and that international commitments will be respected.  
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